

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Implementation of Section 224 of the Act;
Amendment of the Commission's Rules
and Policies Governing Pole Attachments

WC Docket No. 07-245
RM-11293
RM-11303

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To: The Commission

INITIAL COMMENTS OF NEXTG NETWORKS, INC.

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Summary

In 1998, the Commission ruled that wireless devices qualify as "attachments" under Section 224, and thus, wireless telecommunications carriers are entitled to attach such devices on utility poles at regulated rates, terms and conditions. In the ten years that have passed, some progress has been made, however, a significant number of pole owners, particularly electric utilities, have ignored the Commission's orders and run roughshod over the attachment rights granted by Congress to NextG and other telecommunications providers that include wireless facilities in their networks. On a regular basis, NextG encounters lengthy delays, demands for exorbitant, "market" pole rental fees, categorical denials of access to pole tops ostensibly on the basis of unfounded safety concerns, and a host of egregious terms and conditions of attachment. NextG believes that this problem stems in large part from the fact that the Commission has not adopted wireless-specific pole attachment regulations.

The Commission should adopt specific rules reiterating its prior holdings that pole attachment rates for wireless devices are *regulated*, and not based on a "market" for poles that does not exist. Moreover, the Commission should eliminate any ambiguity about the rate formula that applies for wireless attachments and should expressly order a straight-forward application of the existing rate formula to wireless attachments: the utility's telecommunications pole attachment rate multiplied by the number of feet of useable space actually occupied by the wireless attachment. Further, the Commission should not permit utilities to charge higher rents for pole top attachments because (1) such action is not authorized under Section 224; (2) pole tops are no more unique than any other portion of a utility pole; and (3) such an approach would be an open invitation for abusive rates that would effectively deny NextG access to pole tops.

In addition, a set of specific attachment rules are needed in order to eliminate ambiguity and to clearly identify the rights of attachers using wireless facilities and the obligations of utility pole owners with respect to wireless attachments. NextG submits that the Commission should adopt rules that explicitly recognize and protect wireless attachments, including the following:

- a rule that pole top attachments must be allowed;
- a rule prohibiting allowing all-dielectric self supporting ("ADSS") fiber installation in the "power space" on poles and prohibiting pole owners from categorically prohibiting attachments to any part of the pole where the attachments would comply with the NESC;
- a rule permitting the installation of equipment boxes in unusable space;
- a rule permitting attaching parties to use any qualified electrical workers to perform make-ready work and to install and maintain wireless attachments;
- a rule prohibiting utilities from declaring street light poles and poles with attachments above a certain voltage "off limits" to wireless attachments;
- rules mandating performance of preconstruction surveys and completion of make-ready work within the specific timeframes set forth above; and
- a rule establishing a presumption that wireless attachments that comport with the NESC and FCC and OSHA regulations may not be denied on the basis of safety or reliability.

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NextG Networks, Inc., on behalf of its operating subsidiaries NextG Networks of NY, Inc., NextG Networks of California, Inc., NextG Networks Atlantic, Inc., and NextG Networks of Illinois, Inc. ("NextG"), respectfully submits these Comments pursuant to the Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission (hereinafter, the "Commission") on November 20, 2007 in the captioned proceeding. NextG's Comments primarily will address the issues pertaining to the attachment of wireless devices to utility poles that are set forth in paragraph 34 of the NPRM as well as issues pertaining to terms and conditions of access set forth in Section IV of the NPRM.

I. INTRODUCTION

NextG appreciates the opportunity to relate its experiences attaching (or attempting to attach) its telecommunications facilities, which include wireless devices, to distribution poles around the nation. The Commission first declared that wireless devices qualify as attachments in 1998, and some progress has been made since that time. Indeed, NextG has found some pole owners to be cooperative and reasonable in responding to requests for attachments. Many more utilities, however, initially have responded by saying that they have no internal standards or

guidance that would allow them to enter into such agreements and that such standards and agreements would need to be developed -- through a long process. Because the Commission has never promulgated a set of wireless-specific pole attachment rules, the lack of such rules and clear guidance has created ambiguities and differing interpretations by utilities that, intentional or not, have acted to impede, restrict or outright deny NextG access to utility poles. Accordingly, the *status quo* is not working in all cases, and the result is a deterrent to the prompt and timely deployment of broadband and competitive telecommunications services. NextG respectfully submits that the Commission should use this opportunity to promote the deployment of competitive networks, and particularly broadband and next generation wireless networks, by adopting rules explicitly recognizing and protecting attachments of wireless facilities, as set forth below.

II. BACKGROUND REGARDING NEXTG

A. NextG's Telecommunications Service And DAS Networks

NextG provides telecommunications service via Distributed Antenna Systems ("DAS"). As a result, it is at the cutting-edge of the provision of telecommunications services using advanced technologies and capabilities -- both wireless and wireline. At its most basic level, NextG provides telecommunications services to wireless providers that enable those entities to provide next-generation broadband and telecommunications wireless services and achieve greater coverage and capacity for their wireless services. NextG's telecommunications service and network are currently utilized primarily by Commercial Mobile Radio Service ("CMRS") providers, however, its networks and services are not limited to CMRS providers. While frequently focused initially on a specific customer's needs, NextG can host multiple carriers and is therefore an efficient, cost-effective alternative for the deployment of multiple wireless telecommunications facilities. In other words, NextG enhances the performance of existing

mobile wireless infrastructure with minimally intrusive installations using, to the extent possible, existing infrastructure.

As wireless providers seek to deploy the next generation of wireless services and meet the demands for improved capacity and coverage for existing services, one of the key obstacles they face is the technical limitations of traditional "high site" antenna towers and local management of their placement. Traditional towers and rooftops may be reasonable solutions for providing low capacity, wide-area coverage (assuming the sites can be built or acquired where they are needed, which often is a problem). As demand for capacity on wireless networks grow, however, more and more sites must be added to networks so that the frequency spectrum that a particular operator owns can be reused more often.¹

NextG believes that one of the most effective ways to add sites is through the use of "low" site antennas. These types of antenna sites facilitate a greater reuse of the wireless spectrum because relatively low-height antennas can be more easily isolated from each other, thus resulting in a much higher capacity and quality network that is not possible with a network consisting entirely of high-site antennas. In addition to capacity benefits, a network of "low" sites in an urban area can provide coverage in many "dead-spots" that would be "shadowed" under the traditional antenna locations or where zoning laws simply prohibit the installation of high-site facilities. Higher capacity and greater coverage, in turn, are the necessary building blocks for broadband wireless services.

¹ Capacity in a cellular network comes, in general, from reusing spectrum. The greater the number of radiating elements, the more often spectrum can be reused and the more capacity the network will have. Of course, this general statement varies somewhat depending on the type of technology used, *i.e.*, variants of TDMA or CDMA gain capacity and system performance in different ways. NextG's wireless solution is "protocol agnostic" and can accommodate all forms of wireless technologies.

The architecture of NextG's DAS facilities consists of fiber-optic lines leading to and connecting various equipment and antennas at remote locations called "Nodes" with a central "hub," which typically is located in a building on private property. While NextG installs its fiber-optic lines either underground, in conduits, or aerially on poles, it must install its Node equipment (antennas and related equipment boxes) on poles. NextG's service requires a contiguous grid of relatively closely spaced "low site" antennas. For these reasons, access to poles in the public rights-of-way and utility easements (*e.g.*, utility poles, street light poles or traffic signal poles) is critical (from both a technical and economic perspective) for the deployment and operation of NextG's networks. NextG uses either poles owned by the local utility company or poles owned by the municipality, or a combination of both.

The DAS networks that NextG seeks to install on distribution poles typically are comprised of: (1) fiber-optic cable, which is attached horizontally to utility poles in the traditional manner; (2) small pole-mounted antennas; and (3) small pole-mounted equipment, containing transmission electronics for the system that is connected to the fiber-optic cable and antennas. While NextG serves wireless providers and incorporates antennas into its network, its system consists primarily of wireline (fiber-optic cable) attachments to existing poles. The antennas and cabinets (*i.e.*, nodes) typically are attached on 7 percent or less of the total poles utilized in the DAS network.

The equipment NextG is deploying for its current DAS networks typically includes either an omnidirectional antenna or a directional panel antenna, as well as an equipment box located on the pole's unusable space that is of differing size depending on the particular deployment. Pictures of typical installations of NextG's equipment on utility poles are provided in Attachment 1. NextG's antennas will be installed in some cases in the "communications space"

on the pole (*i.e.*, mid-pole), but in most cases on the pole top. Indeed, pole top attachment is the only feasible location in some locations or markets.² In cases where necessary to maintain proper space clearances, NextG will install pole top extensions that are 4 to 6 feet in length.

B. NextG's Experience With Pole Owners

Even though NextG's DAS networks are chiefly wireline, NextG nevertheless has encountered obstacles to the placement of its facilities on utility poles throughout the country. In particular, NextG is concerned with timely performance of pre-construction surveys and make-ready and the interpretation of what should be generally applicable construction standards in ways that unreasonably preclude the use of certain poles or force NextG to install its plant beyond what the applicable standards actually require.³ In this way, NextG has been subject to unreasonable access denials and excessive, but unnecessary, make-ready delays and costs.⁴

² See *NextG Networks of NY, Inc. v. Public Service Electric & Gas*, EB-07-MD-004, Reply Declaration of Norine Luker at ¶¶ 9-11 (filed Feb. 11, 2008).

³ Despite the fact that the NESC addressed clearance and other issues, pole owners sometimes impose construction standards and limits that exceed the NESC. There is no basis for such excessive demands. Moreover, the variation among pole owners' "standards" creates uncertainty and makes it difficult for attaching parties to plan their deployments and estimate costs. This is particularly the case where the utility responds to a request to attach by asserting that it must first develop construction standards specifically for wireless attachments – a process that then takes many months if not years. The Commission should clarify that the NESC governs all attachments and that individual pole owners cannot impose more strenuous standards, particularly on fundamental issues addressed by the NESC, such as clearances or delay attachment in order to develop entirely new construction standards.

⁴ Indeed, in December 2007, NextG had to file a complaint with the Commission against PSE&G for denial of access. Seven months after NextG applied, PSE&G, without explanation or support, categorically denied NextG attachment to the tops of PSE&G's poles, as NextG had requested. *NextG Networks of NY, Inc. v. Public Service Electric & Gas*, File No. EB-07-MD-004, Complaint at ¶¶ 8-27 (filed Dec. 21, 2007).

In NextG's experience, some pole owners make unsupported claims that certain wireless structures on distribution poles are unsafe. As discussed below, these claims are untrue.⁵ Wireless devices can be, and have been, safely installed on utility poles, including at the top, without adversely affecting safety or reliability. Indeed, the National Electrical Safety Code ("NESC") already contains rules governing such attachments. The fact remains that distribution poles are essential, bottleneck facilities in the possession of monopolies, some of which compete directly with certain wireless attachers. The Commission should take this opportunity to adopt rules to ensure that pole owners are not using their unique position to thwart deployment of competitive networks or to leverage an unlawful windfall profit.

Delays in obtaining attachment rights are significant problem facing NextG. When NextG initially approaches a utility to request attachment, the response commonly is "no, wireless attachments are not permitted because of company policy" or "no, because wireless attachments are not safe." Often, NextG is directed to discuss attachment with the utility's "business development" group, which is tasked with treating pole attachments not as a regulated obligation of the utility, but as a profit center. (Ironically, these "business development" groups have developed "safe" methods for attachment of antennas to transmission infrastructure that carries much higher voltages and therefore pose much more serious safety and reliability issues than distribution infrastructure that allegedly raises insurmountable safety concerns.) However, once the pole owner has been convinced through strenuous effort – and time – that the joint use department of the utility is a more appropriate group to handle NextG's agreement, in almost all

⁵ As NextG's detailed submissions in its case against PSE&G demonstrate, PSE&G's "safety" concerns were meritless. *NextG Networks of NY, Inc. v. Public Service Electric & Gas*, File No. EB-07-MD-004, Reply at 10-20; Reply at Exh. 5 (Declaration of David Marne) (filed Feb. 11, 2008). Due to the volume of evidence submitted by NextG in support of the safety of its attachments in the case, NextG will not re-attach the materials as exhibits hereto.

cases, pole owners have claimed that they do not have a "wireless" attachment agreement or construction standard for distribution poles, and so they cannot respond to NextG's request for *access until the utility develops one. This usually takes several months or even years, and in more than one situation, the utility has still not provided the wireless-specific exhibits to its form agreement more than two years after NextG initially contacted the utility. After months -- and often years -- of discussions and negotiation, many (but by no means all) utilities have moved beyond their initial objections and negotiated mutually acceptable methods of attachment. However, the inability to design DAS networks in the interim due to the uncertainties regarding what NextG can attach and where it can attach has caused significant problems for NextG and severely impeded its ability to serve its customers and the public.*

Another flavor of this sort of utility response is exemplified by one large power utility that covers large portions of the southern United States. This particular electric utility refused to enter into an attachment agreement or discuss rates, terms and conditions or where NextG could attach antennas on the pole until NextG identified the specific pole(s) intended for use. This precondition of negotiations made it impossible to design and market a DAS network in those areas.

The Commission should make clear that the attachment of an antenna is not the opportunity for a pole owner to invent a whole new attachment regime. Delays like those encountered by NextG and others are delaying the deployment of competitive networks and services. Indeed, the Commission has recognized the public policy benefits of affording wireless carriers with access to utility poles as it "facilitates the deployment of cell sites to improve the coverage and reliability of their wireless networks in a cost-efficient and environmentally friendly manner. Such deployment will promote public safety, enable wireless carriers to better

provide telecommunications and broadband services and increase competition and consumer welfare in these markets.”⁶

As another real-world example of the onerous, and patently unlawful, restrictions that some utilities attempt to impose on wireless attachments, the following summarizes some of the more egregious provisions of the standard (*i.e.*, non-negotiable) wireless attachment agreement of another major electric utility located in the southeastern United States:

- The utility “reserves the top eleven (11) feet of the Distribution Pole for its Facilities” and thereby categorically denies NextG pole top access to its utility poles;
- The utility categorically denies access to all poles with facilities carrying more than 25 kiloVolts and all street light poles;
- The utility demands an “Initial Review Process” during which time NextG must deliver the “actual working Device” proposed for attachment for “testing” by the utility (at a rate of \$70 per hour); and
- The utility demands the “immediate removal” of any wireless device that “causes local residents or business owners to express discontent” about their placement on a pole.⁷

To date, the utility has stridently refused to alter *any* of these terms. This is the environment in which NextG operates each day – in which pole owners routinely ignore the

⁶ *Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, Public Notice, 19 FCC Rcd. 24930 at 1 (Wireless Telecom, Bureau 2004) (“Public Notice”).

⁷ NextG has not yet signed the utility’s agreement. Because NextG maintains a politically sensitive relationship with such pole owners, it is constrained in its ability to be more specific at this time. Moreover, utilities commonly require NextG to sign non-disclosure agreements as a condition of even being provided a copy of the utility’s agreement terms, thus further constraining NextG’s discussion here. If the Commission specifically requests that NextG share this agreement, NextG will do so.

Commission's broad policy statements regarding wireless attachments and pole attachment precedent in blatant disregard of the rights afforded attachers by Section 224.

III. THE COMMISSION SHOULD MAINTAIN REGULATED POLE ATTACHMENT RATES FOR WIRELESS ATTACHMENTS AND ADOPT A RATE FORMULA

With respect to the pole attachment rate that should apply to wireless devices, the Commission has requested comment on

whether, when they are "telecommunications carriers," wireless providers are entitled to the telecom rate as a matter of law, or whether we should adopt a rate specifically for wireless pole attachments. For example, if a wireless facility uses more than the presumptive one foot of space, could the per-foot rate simply be doubled, trebled, or otherwise multiplied as required.⁸

A. The Commission's Prior Rulings on Wireless Pole Attachment Rates

The question of whether wireless devices qualify as "attachments" under Section 224 – and, therefore, subject to regulated attachment rates – was settled a decade ago by the Commission. In 1998, the Commission ruled that "Wireless carriers are entitled to the benefits and protections of Section 224,"⁹ and noted that wireless attachments may include "an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service."¹⁰ That determination was upheld by the United States Supreme Court in 2002.¹¹ Thus, the question of whether wireless devices attached by NextG to provide its telecommunications service are "entitled to the telecom rate as a matter of law" has

⁸ NPRM at ¶ 34.

⁹ *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd. 6777 at ¶ 39 (1998).

¹⁰ *Id.* at ¶ 41.

¹¹ *National Cable & Telecom. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).

already been resolved. Section 224 mandates that NextG and others are entitled to attach at regulated rates.

Specifically with respect to pole attachment rates applicable to wireless devices, in 2003 the Enforcement Bureau refused to allow PECO Energy to impose an exorbitant rental fee (\$2,100 per year) for wireless attachments, and instead ordered the utility to “provide Omnipoint [now T-Mobile] access to its facilities at just and reasonable rates in accordance with the Pole Attachment Act and the Commission’s rules.”¹² Further, the Enforcement Bureau ordered PECO Energy to “provide Omnipoint with historical cost data related to the specific facilities to which Omnipoint seeks attachment.”¹³ In December 2004, the Wireless Telecommunications Bureau issued a public notice “reminder” to utility pole owners of the Commission’s prior rulings and their obligation to provide wireless telecommunications providers with access to poles at reasonable rates, stating:

section 224 and the Commission’s rules do not allow pole access fees to be levied against wireless carriers in addition to the statutory pole rental rate, which is based on the space occupied by the attachment and the number of attaching entities on the pole, together with reasonable make-ready fees. Such overcharges ... for wireless pole attachments may have serious anticompetitive effects on telecommunications competition.”¹⁴

The Commission should maintain its long-standing interpretation – consistent with Section 224 and affirmed by the U.S. Supreme Court – that wireless devices are entitled to *regulated* pole attachment rates. As discussed below, to the extent that the issue is the amount of usable pole space actually occupied, then NextG agrees that the Commission’s existing formula

¹² *Omnipoint Corp. v. PECO Energy Co.*, Memorandum Opinion and Order, 18 FCC Rcd. 5484 at ¶ 7 (Enf. Bur. 2003).

¹³ *Id.*

¹⁴ Public Notice at 1.

can and must be applied, with the actual number feet of occupied usable space applied. The use of more than one foot does not alter the fundamental premises of the Commission's rate formula.

B. NextG's Experience with Pole Attachment Rates

Despite the Commission's repeated rulings and "reminders" that utilities are required to charge historic, cost-based pole attachment fees for wireless devices, NextG's first-hand experience across the country is that these rulings often are being ignored by utilities. Although some utilities have employed a cost-based formula, typically the telecom rate multiplied by the number of feet occupied by the attached devices, NextG has encountered others who seek to impose fees that clearly have no relation whatsoever to the utility's costs of owning and maintaining a pole. As discussed above, multiple utilities have referred NextG to their non-regulated "business development" group, which demand exorbitant "market" based rates that have no relation to pole costs and instead, are clearly intended to extract the maximum possible monopoly pole rents from third party attachers.¹⁵ Essentially, these "business development" groups attempt to force NextG to pay profit-based attachment rates modeled after the rates the utility charges for attachment of full-blown cell sites to unregulated transmission towers. Several electric utilities across the United States impose annual attachment fees of \$1,200 per pole or more for wireless attachments. Again, these annual fees bear no relation to the cost of owning and maintaining a utility pole whose depreciated cost to the utility may only be a few hundred dollars. Further, this sort of "market based rate" model by investor-owned utilities ("IOUs") has a ripple effect that extends to other pole owners that are not subject to Section 224, such as municipal utilities. These entities base their rates on what their neighboring IOUs have extracted

¹⁵ Given that there is no competitive market for utility poles – the fundamental premise for Section 224 – this "market rate" nomenclature used by the utilities is grossly misleading and inapplicable.

and because they are unregulated, there is no recourse. Unfortunately, the unreasonable demands of some electric utilities has interfered with NextG's ability to market and deploy its telecommunications service.

Reinforcing the need for the Section 224 rate regulation, NextG theoretically could install its own pole for less than paying some of the utilities' demands. However, state and local government officials generally either outright prohibit the installation of new poles or would strongly oppose their installation. Accordingly, what the utilities are doing is leveraging their monopoly right to own utility poles. Section 224 was adopted precisely to prohibit such abuse.

C. NextG's Proposed Rate Rule for Wireless Attachments

The Commission has requested comment on "whether [it] should adopt a rate specifically for wireless pole attachments."¹⁶ In light of the foregoing, NextG submits that the Commission should expressly order a straight-forward rate formula that applies to wireless attachments: the utility's wireline telecom pole attachment rate multiplied by the number of feet of usable space actually occupied by the wireless attachment.¹⁷ The Commission should further clarify that usable "space occupied" by a wireless device does not include cables running between the antenna and the equipment box because this space is available for other attachments. Such an approach is consistent with Commission precedent,¹⁸ and fairly compensates utilities for any additional pole space occupied by the wireless device beyond the one-foot presumption.

¹⁶ NPRM at ¶ 34.

¹⁷ This approach is consistent with the Commission's previous statements that the pole attachment formula presumptions may be modified or adjusted in order to address unique attachments associated with wireless systems. See *Omnipoint Corp. v. PECO Energy Co.*, Memorandum Opinion and Order, 18 FCC Rcd. 5484 at n. 20 (Enf. Bur. 2003); *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd. 6777 at ¶ 42 (1998).

¹⁸ See *Texas Cablevision Co. v. Southwestern Electric Power Co.*, 1985 FCC LEXIS 3818 at ¶ 6 (1985).

The Commission asked in the NPRM “if a wireless facility uses more than the presumptive one foot of space, could the per-foot rate simply be doubled, trebled, or otherwise multiplied as required?”¹⁹ There is no need or basis to establish a new “per-foot” rate applicable to wireless attachments. The approach suggested by NextG is far more straight-forward and requires no additional rate computation beyond the simple process of multiplying the utility’s already available per-foot pole rate by the number of feet of usable pole space occupied.

D. Pole Top Attachments Should Not Result in a Higher Rate of Compensation

The Commission asks “should pole owner receive a higher rate of compensation [for pole top attachments], because unlike lateral space, each pole has only one top?”²⁰ For several reasons, the answer to this question is “no.” First, for computing pole attachment rates, Section 224 mandates that to be “just and reasonable,” a rate must be based on the amount of space used and the utility’s actual, historic costs.²¹ Nothing about the use of the pole top changes the utility’s cost to own and maintain the pole or the amount of space occupied by the attachment. The Commission has no authority under the Communications Act to deviate from the cost-based rate approach mandated by Congress in Section 224, and certainly not to effectively “de-regulate” attachment rates based on their location on the pole. There simply is no basis in Section 224 and no precedent in the Commission’s orders or pole attachment case law for a “higher rate of compensation” for devices attached near at or near the top of a pole.²² Such an

¹⁹ NPRM at ¶ 34.

²⁰ NPRM at ¶ 34.

²¹ See 47 U.S.C. § 224(d)(1) (For computing pole rates, the “actual capital costs of the utility attributable of the entire pole” must be used.).

²² Indeed, the Commission cited NextG’s Comments filed in the *Fibertech Networks Petition* proceeding in support of this assertion. But in those Comments, NextG simply asked the Commission to establish a presumption that pole top access should be permitted. Nothing in

approach would be an open invitation for utilities to demand exorbitant, monopoly rates, and thereby either result in a financial windfall for utilities or effectively deny NextG and others access to pole tops.

In addition, adopting a theory that imposed attachment rates based on some perceived "value" of the pole location would have vast effects that would undermine the longstanding policies underlying Section 224 and the Commission's rules. For example, the imposition of unregulated rates for pole top attachments would mean that wireless attachers would be subsidizing other third party attachers by providing a significant cost recovery by the utility. Such a subsidy, presumably, should result in a decreased rate for all other attaching entities. Indeed, in many cases, utilities seek to impose pole top rates that exceed their costs. In such cases, should all other attaching parties attach for free, at the expense of the wireless attachment? Likewise, utilities themselves frequently attach facilities to the tops of poles. If the theory is true that such pole tops are somehow more valuable, then the utility should be required to apportion to itself a greater "rate" for attachment and all other attaching entities should pay less. Similarly, a theory that attributed "value" to a particular spot on a pole and attempted to adjust rental rates accordingly should then lead to an increased rate for ILECs who are permitted to attach their lines at the lowest point -- which is generally considered a more favorable (or "valuable") position because it is easier for technicians to access. These examples illustrate how any attempt to ascribe "value" to parts of the pole would be antithetical to and radically disrupt decades of pole attachment law and policy.

In reality, the top portion of the pole is no more unique than any other portion of the pole. For any particular space on a pole, once it is occupied by an attachment, that space is no longer

those Comments can be reasonably read to support the notion that a pole top is "unique" or that utilities should be permitted to charge higher rates for pole top attachments.

available for other attachments. But this is equally the case for pole tops as well as all other portions of the pole. Indeed, the top of a particular pole is essentially an arbitrary point because pole height can be extended (at the attaching party's expense, typically) by either (a) a pole replacement (*i.e.*, a pole change-out) or (b) the use of pole-top extenders.

The Commission further should keep in mind that while there may be only one top of each pole, unlike wireline attachments that are attached to every pole along a line, wireless attachments will not occupy all or even a significant number of utility poles. For NextG's systems, for example, the antennas and cabinets are typically attached on only 7 percent or less of the total poles utilized in the DAS network. As a result, utilities will not be faced with requests for pole top access on all or even a significant percentage of their poles.

In 1999, the Commission expressly declined to establish a presumption that space above what has traditionally been referred to as "communications space" on a pole may be reserved for utility use only.²³ But declaring the pole top or space above communications space to be "unique" and therefore subject to "market rates" effectively would have precisely the same result. Utilities would wield their monopoly power over poles to the detriment of wireless carriers and telecommunications providers such as NextG and to the detriment of the public.

IV. THE COMMISSION SHOULD PROMULGATE RULES TO ADDRESS SIGNIFICANT PROBLEMS FACING ATTACHERS

As mentioned above, NextG's service requires access to existing utility poles, and other structures in the rights-of-way. While NextG has been able to work cooperatively with most utilities, unfortunately, it also has faced numerous obstacles to the placement of its facilities on utility poles – most of which appear to stem from the fact that some of the facilities that NextG

²³ See *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order on Reconsideration, 14 FCC Rcd. 18049 at ¶ 72 (1999).

seeks to install are "wireless." The mere fact that the technology involved is wireless too frequently leads to claims that the attachment is "unregulated." These barriers to entry have been erected by utility pole owners in disregard of NextG's rights to access utility poles as a telecommunications provider, even if some of the equipment will be "wireless" or wireless-related.

The *status quo* simply is not working. While the Commission has announced its policies with respect to wireless attachments in various orders, one adjudicatory proceeding and a public notice, it is clear that more must be done because utilities in many cases are ignoring these orders. A set of wireless-specific attachment rules is needed in order to eliminate ambiguity and to clearly identify the rights of attachers using wireless facilities and the obligations of utility pole owners with respect to wireless attachments. By adopting the proposed rules set forth below by NextG, the Commission will eliminate barriers to the deployment of new telecommunications services, as well as wireless or wireless-related broadband services and facilities.

A. The Commission Should Adopt a Rule Establishing A Presumption Allowing Pole Top Attachments

A significant issue for NextG and wireless attachers is the opportunity to place antennas at or near the top of the pole. For NextG, there are several reasons why this is a particularly important issue. Pole top placement of antennas provides greater coverage by the simple fact that it is higher than a mid-pole attachment, which provides better coverage. By increasing the coverage area, increased antenna height, in turn, may significantly reduce the total number of

antennas needed for an installation, thereby decreasing total network cost and minimizing the potential community "impact."²⁴

As a threshold matter, the Commission should recognize that attachment of wireless facilities to the top of utility poles can be accomplished safely, consistent with recognized engineering standards, and without any negative impact on reliability. For example, the NESC contains rules that govern the placement of wireless antennas on pole tops. For example, Rule 235I prescribes clearance specifications between antennas attached in the supply space and electrical conductors.²⁵ The same rule also ensures that "[c]ommunications antennas located in the supply space [be] installed and maintained only by personnel authorized and qualified to work in the supply space. ..."²⁶ NESC Rules 222 (Joint Use Structures), 224A (Communications circuits located within the supply space and supply circuits located within the communications space), 230A(3)-(4) (Measurement of clearance and spacing; Rounding of calculation results).²⁷ Rules 236-238 (Climbing Space; Working Space and Vertical clearance between certain communications and supply facilities located on the same structure) also apply to wireless

²⁴ NextG frequently encounters opposition or difficulty from local governments. In many communities, each of its Node attachments to utility poles, simply because they involve a wireless device, are subject to complex, burdensome, lengthy, and wholly discretionary "zoning" approvals. While NextG believes that many of these municipal processes are preempted by Section 253 of the Communications Act, 47 U.S.C. § 253, nonetheless, they are far too frequent, and thus, since denial of access to pole tops could double of the number of Nodes subject to zoning and at the same time double the "impact" that will be identified by local authorities it poses an multi-layered potential barrier to NextG's deployment.

²⁵ See Attachment 2, NESC Rule 235I(2)-(4).

²⁶ See Attachment 2, NESC Rule 235I(1).

²⁷ See Attachment 2, NESC Rules 222, 224A, 230A(3)-(4).

attachments, as do all of the loading and strength rules in Sections 24-26 and all of the worker safety rules in Sections 42-44, among others.²⁸

In the Public Notice released in 2004, the Wireless Telecommunications Bureau reminded pole owners that pole top attachments cannot be categorically prohibited, but the fact remains that many utilities continue to resist or severely restrict pole top placement. Utilities typically attempt to justify these denials of access on the basis of nebulous and meritless safety concerns.

Based on the refusal of utilities to heed the Commission's Public Notice and holding in its 1999 Order, NextG respectfully submits that the Commission should adopt a specific, explicit rule establishing a presumption that pole top attachments for wireless devices are allowed. To rebut the presumption as to a specific attachment to a specific pole, a pole owner should be required to obtain an order from the Commission based on conclusive evidence holding that a proposed attachment to a particular pole cannot be accomplished because of insufficient capacity or safety, reliability, and generally applicable engineering purposes that cannot be remedied through make-ready, pole expansion or change-out at the attaching party's expense, or other engineering solutions that are acceptable under generally applicable engineering or safety standards. Such a presumption would be rebuttable on a case-by-case, pole-by-pole basis. It would not necessarily give providers advance approval for the attachment of wireless devices on every utility pole. However, it would eliminate the ability of utilities to impose

²⁸ See Attachment 2, NESC Rules 236-238; Attachment 3, Declaration of David Marne, submitted to the New York Public Service Commission with NextG's comments in the NY PSC's *Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles*, NY PSC Case No. Case 07-M-0741 (filed Sept. 10, 2007); Attachment 4, Reply Declaration of David Marne, submitted to the Commission by NextG in the FCC complaint proceeding *NextG Networks of NY, Inc. v. Public Service Electric & Gas Co.*, File No. EB-07-MD-004 (filed Feb. 11, 2008).

blanket/categorical objections to pole top attachments. NextG recognizes that utility poles come in a variety of sizes and configurations. However, NextG can adjust its attachment designs to accommodate the different pole characteristics in a manner that complies with governing standards, including the NESC.

Moreover, beyond pole top attachments, NextG submits that the Commission should create a presumption that wireless antennas and equipment that comply with governing regulations and applicable standards, such as the NESC, in general, must be presumed safe and permitted, subject to pole-by-pole evaluation.²⁹ If a utility seeks to impose a standard that goes beyond the NESC, the pole owner should bear the burden of explaining to the provider, and ultimately to the Commission, why they have adopted a stricter practice than the NESC. Such a policy is needed to prevent categorical denials of access to utility distribution poles and the imposition of arbitrary and burdensome standards beyond those of the NESC and other governing codes and regulations. Moreover, such a presumption would put wireless attachments on the same footing as wireline attachments. Currently, utilities are still fighting the idea that wireless attachments should be permitted *at all*. To promote the deployment of wireless broadband, advanced services, and expanded competitive service, the Commission should once and for all make clear that wireless attachments must be presumed permitted.

Indeed, the Commission should also adopt a rule clarifying that attachment in the "supply space" must be permitted if consistent with NESC standards. For example, as part of its DAS networks, NextG must install fiber-optic lines. In some cases, in order to avoid costly make-ready or general congestion in the so-called "communications space," NextG has proposed to install all-dielectric self supporting ("ADSS") fiber-optic lines in the "power space." ADSS fiber

²⁹ See Attachment 2, NESC Rule 235I and Table 235-6.

is "self supporting," meaning that it does not require an underlying metal strand wire. As a result, it has been commonly installed by electric utilities themselves close to electric lines without the clearance required for standard fiber-optic attachments. Despite the fact that the utilities themselves have deployed ADSS fiber, in some cases for their telecommunications subsidiary, NextG has encountered resistance to its use of ADSS fiber. Essentially, this reflects two important problems. First, electric utilities too often view the "power space" as their sole province, and indeed beyond the regulatory reach of the FCC. An example of this is the insistence by one major electric utility located in the southeastern U.S. (discussed above in Section I(B)) that it has exclusive access to the top 11 feet of every distribution pole. This particular utility maintains this position – in an FCC regulated state – despite the fact that the FCC has previously announced that the "power space" cannot be categorically excluded from attachment. Second, by forcing all communications companies into the "communications space," utilities can develop additional revenue from marked-up make-ready charges and can essentially create the capacity issues that they then use to argue to the Commission and courts for increased, deregulated rates.

While no company should be forced to use ADSS fiber, if in a particular situation NextG or any other attaching entity desires to use ADSS fiber, the utility should be specifically prohibited from denying access for or use of ADSS fiber in the "power space" on poles. The Commission's previous holdings have proven inadequate, and a specific rule is necessary to protect attaching parties' rights.

B. The Commission Should Adopt Rules Mandating the Timely Performance of Preconstruction Surveys and Completion of Make-Ready Work

NextG also has had significant difficulties with pole owners on issues of performing preconstruction surveys and completing make-ready work. In one situation, NextG paid the

utility for make ready work on fourteen sites. However, the utility refused or failed to perform the work until *six months later*, and then only after contact from NextG's attorney. This project involved only fourteen poles – not hundreds or thousands – and yet the utility refused to provide NextG any clear timeline for completion of make ready.

There is only one FCC rule that addresses make-ready intervals, 47 C.F.R. § 1.1403(b), which requires utilities to respond to requests for access within 45 days. There are no explicit rules that address intervals for completing make-ready or performing preconstruction surveys. Utilities take advantage of these gaps in the rules and often maintain a lackadaisical (or worse) attitude with respect to performing surveys and completing make-ready (even after receiving full payment in advance). NextG submits that in order to remedy this situation the Commission should promulgate rules that require utilities (1) to perform preconstruction surveys within 45 days of the application filing date and (2) to complete make-ready work within 45 days of the date payment is received by the pole owner.³⁰ These intervals are consistent with those established by the New York Public Service Commission after a comprehensive proceeding that included the participation of pole owners and third party attachers.³¹ These intervals are reasonable and yet, will not permit utilities to needlessly delay the implementation of NextG's DAS installations for the benefit of wireless carriers and the public.

³⁰ As discussed below, the Commission should also adopt a specific rule requiring utilities to allow attaching parties to use qualified contractors to perform the work, thus eliminating any claim that the utility lacks sufficient staff to act in these timeframes.

³¹ *Proceeding on Motion of the [New York Public Service] Commission Concerning Certain Pole Attachment Issues*, NY PSC Case 03-M-0432, Order Adopting Policy Statement on Pole Attachments, Appendix A at 3-4 (Aug. 6, 2004). The New York PSC has an on-going proceeding to determine if these intervals should apply to wireless attachments. *See Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles*, NY PSC Case 07-M-741.